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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1087

STATE OF NEW YORK,

Petitioner,

v.

MORTON SALT COMPANY, PIONEER SALT COMPANY, SALT SERVICE INCORPORATED, INTERNATIONAL SALT COMPANY, CAYUGA ROCK SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

STATE OF NEW YORK,

Petitioner,

v.

MORTON SALT COMPANY, PIONEER SALT COMPANY, SALT SERVICE INCORPORATED, INTERNATIONAL SALT COMPANY, CAYUGA ROCK SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

THE STATE OF NEW YORK PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN THE ABOVE ENTITLED CASES FILED NOVEMBER 6, 1967.

REPORTS OF THE OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 385 F. 2d 122 (3rd Cir. 1967) and 1967 Trade Cases, ¶ 72,266. It is appended to this Petition, pages 1a-4a.

JURISDICTION.

The Judgment and Opinion of the United States Court of Appeals for the Third Circuit affirming the Order of the United States District Court for the Eastern District of Pennsylvania were filed on November 6, 1967.

The jurisdiction of this Court is based on Section 1254, Title 28, United States Code, providing for appeal from cases in the courts of appeals "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree, ..."

QUESTIONS PRESENTED.

1. Does the decision of the Third Circuit, which assumes the existence of all prerequisites for intervention of right by Petitioner under F. R. C. P. 24(a)(2) as amended, but denies such intervention solely on the unsupported ground that the application therefor was untimely, run counter to the decision of this Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967), since such application was filed:

(a) prior to the completion of interrogatory, documentary or deposition discovery by either side;

(b) prior to the expiration of the applicable statute of limitations period (Clayton Act, Section 5B, 15 U. S. C. 16(b)); and

(c) prior to a firm trial date being set or any major settlements being consummated?

2. In a private antitrust action in which a national class of state and local governmental bodies was held valid under

former F. R. C. P. 23(a)(3), has Petitioner, People of the State of New York, been deprived of its right to obtain the benefits of the class action by reason of the District Court Order dated February 6, 1967 which denied Petitioner's application for intervention under F. R. C. P. 24, as amended, solely on the ground that its application was untimely, when at the time it was filed:

(a) the applicable statute of limitations period had not yet expired, whereas the order denying intervention was handed down after the expiration of such period;

(b) there existed a prior order closing the class which order Petitioner could not challenge until it moved to intervene;

(c) the reasons upon which such class-closing order was based (namely, that all discovery would be completed by the closing date and that there would be adherence to an established trial schedule commencing shortly thereafter) were incapable of fulfillment as of the date the class was purportedly closed;

(d) Petitioner received no notice, actual or constructive, of the closing of the class; and

(e) no firm trial date had been set nor any major settlements consummated?

3. Is the decision of the Third Circuit denying intervention under such circumstances in conflict with decisions in the Second, Seventh and Tenth Circuits where interventions in class actions were held timely up to the time of trial and even after judgment and even where the statute of limitations period had already expired?

4. When a court purports to close a valid class action under former F. R. C. P. 23(a)(3) and no notice of that closing is given to Petitioner or to New York State Thruway Authority, members of that class, may knowledge of such closing be constructively charged against an out-of-state petitioner, People of the State of New York, so as to deny intervention solely on the circumstance that the Attorney General of the State of New York appeared as formal counsel of record for the Authority which moved to intervene one day prior to the closing date?

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

Federal Rule of Civil Procedure 24(a), (b) as amended:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. (As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 28, 1966, eff. July 1, 1966.)

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon

any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. (As amended Dec. 27, 1946, eff. March 19, 1948.)"

Federal Rule of Civil Procedure 23(a)(3) prior to July 1, 1966 amendment:

"(a) If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is . . .

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

STATEMENT OF THE CASE.

Petitioner, People of the State of New York, seeks intervention in an antitrust action commenced on July 1, 1963 by the City of Philadelphia in behalf of itself and all other state and local governments, governmental agencies and governmental subdivisions similarly situated, against the major national producers of rock salt and certain distributors (Appendix, 5a, 6a). On May 12, 1965, the District Court granted intervention petitions of 59 states and municipal governments (Appendix, 12a-15a). Thereafter several other governmental bodies were permitted intervention. On November 10, 1965, the District Court held the class action to be valid under former F. R. C. P. 23(a)(3). *City of Philadelphia v. Morton Salt Company, et al.*, 248 F. Supp. 506 (E. D. Pa., 1965).

On December 7, 1965, the District Court further ruled that all pre-trial discovery must be completed by June 1, 1966, that the class will be closed on that date and that no additional plaintiffs would be permitted to intervene thereafter (Appendix, 34a). Nowhere in the record of the District Court or of the Court of Appeals is it established, explicitly or implicitly, that Petitioner had any knowledge whatsoever of the Order closing the class.

Petitioner filed its application for intervention on June 14, 1966. At that time, discovery had not been completed,[1] there was no pre-trial delineation of issues and no trial date had been scheduled. A settlement with one minor defendant[2] had been made; no other settlements were consum-

1. At this moment, discovery still has not been completed. Plaintiffs have at least six additional depositions to take, and defendants have yet to take any depositions. Supplemental Interrogatories and a Supplemental Motion for Production of Documents filed by Plaintiffs have not yet been responded to by Defendants.

2. Cargill, Incorporated.

mated.[3] Petitioner filed its motion to intervene within one year of the termination of a similar government civil action against, inter alia, Morton, Diamond and International, *Morton Salt Company v. United States,* 382 U. S. 44, 86 S. Ct. 181, 15 L. Ed. 2d 36 (1965).[4] Prior to that, these same defendants were acquitted in a related criminal action (June 7, 1962).

On February 1, 1967, the District Court, without filing an Opinion, denied Petitioner's application to intervene and ordered the class closed as of June 1, 1966 (Appendix, 65a). The Court of Appeals, in a per curiam Opinion, affirmed, solely on the basis that the District Court's denial of permissive intervention was not an abuse of discretion, and assuming that Petitioner had a right to intervene, its application was untimely. It is from the Judgment and Opinion of the Third Circuit that a Petition for Writ of Certiorari is sought.

BASIS FOR FEDERAL JURISDICTION.

Federal jurisdiction is based upon the Clayton Act, Section 4, Oct. 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15.

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3. Defendants, Morton Salt Company and Diamond Crystal Salt Company, have settled with some, but not all, of plaintiffs. Defendant, International Salt Company, subsequent to the filing of Petitioner's intervention motion, settled with all plaintiffs except the City of Baltimore, and the City of Baltimore's claim was severed from the class action and preserved in a new action. Because International settled with plaintiffs after Petitioner's motion to intervene was filed, International must still be considered a defendant in the class action *vis-a-vis* Petitioner.

4. International entered into a consent decree on November 4, 1963, to be effective January 4, 1964. The United States Supreme Court affirmed the judgment against Morton and Diamond on October 26, 1965.

ARGUMENT.

1. Where no notice of any closing of the class was given to its members, including Petitioner, intervention in a class action, either permissive or of right, under F. R. C. P. 24, as amended, is timely, when the application is filed, as here, prior to substantial completion of discovery, prior to a pretrial delineation of issues, prior to the setting of a trial date, prior to any major settlements and prior to the running of the applicable statute of limitations.

Rule 24 requires, *inter alia,* "timely application" in order for either permissive intervention or intervention of right to be granted. Neither the Rule itself nor the Comments of the Advisory Committee suggest any guidelines as to what constitutes timely or untimely intervention. Denial of Petitioner's application for intervention into a valid class action, of which it is a member, under former F. R. C. P. 23(a)(3), under the circumstances of this case, is an arbitrary departure from the standards of intervention heretofore judicially established and unduly limits the rights of Petitioner who otherwise qualifies for intervention.

In *Union Carbide and Carbon Corporation v. Nisley,* 300 F. 2d 561 (10th Cir. 1962), appeal dismissed sub nom. *Wade v. Union Carbide and Carbon Corporation,* 371 U. S. 801 (1963), a private antitrust action, the Court of Appeals for the Tenth Circuit allowed parties plaintiff to intervene in a spurious class action after trial but before final judgments were entered. Other circuits have upheld interventions in spurious class actions after trial: *Hurd v. Bell Telephone Company,* 234 F. 2d 942 (7th Cir. 1956); *York v. Guaranty Trust Co. of N. Y.,* 143 F. 2d 503 (2nd Cir. 1944), reversed on other grounds 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945); and *Escott v. Barchris Construction Corp.,* 340 F. 2d 731 (2nd Cir. 1965), cert. den. sub

nom. *Drexel & Co. v. George Hall*, 382 U. S. 816, 86 S. Ct. 37, 15 L. Ed. 2d 63 (1965).

In *Carroll v. American Federation of Musicians of the United States and Canada*, 33 F. R. D. 353 (S. D. N. Y. 1963), the Court allowed intervention on the eve of trial in a spurious class action alleging violations of the federal antitrust laws. The test applied to intervention by the Court was ". . . 'whether the intervention will *unduly delay or prejudice the adjudication of the rights* of the original parties.' " 33 F. R. D. at 354. [Emphasis added.] In that case, intervention was granted even though the intervenor: (1) knew of the litigation for a long period; (2) was to be a principal witness for the plaintiffs; and (3) was a plaintiff in a companion suit.

In *State Wholesale Grocers v. Great Atlantic and Pacific Tea Company*, 24 F. R. D. 510 (N. D. Ill. 1959) a private antitrust spurious class action, the Court allowed interventions of party plaintiffs 3½ years after the original action was commenced and 2½ years after the proofs had been closed on the issue of liability.

The instant decision of the Third Circuit is even contrary to that Court's earlier rulings in *Pentland v. Dravo Corp.*, 152 F. 2d 851 (3rd Cir. 1945) where the Court reversed an Order of the District Court which had granted, at the pre-trial stage, defendant's motion for judgment against plaintiff as a representative of a class. The Circuit Court held that it was premature to preclude potential plaintiffs from intervening in a spurious class action at the pre-trial stage. Following that decision, the District Court held in *Fowkes v. Dravo Corp.*, 75 F. Supp. 514 (E. D. Pa. 1946):

> *"It is submitted that the greatest justice is best accomplished in cases such as this to allow the fullest period of time for those employees who desire to have*

the benefit of the court's decree to come into the proceedings."

". . . the opinion of this court, dated August 13, 1945 is amended so that *the case shall remain open for all parties and intervenors until time of final judgment when the court shall determine whether the judgment shall be binding only on those who have joined or whether to allow others similarly situated to be brought in by appropriate supplementary proceedings."* [Emphasis supplied.]

Thus the decision of the Third Circuit is in substantial conflict with decisions of other circuits and its own former decision allowing interventions in similar classes.

This Court has stressed the importance of private antitrust litigation in supplementing enforcement of the antitrust laws. *Leh v. General Petroleum Corp.*, 382 U. S. 54, 86 S. Ct. 203, 15 L. Ed. 134 (1965), reh. den. 382 U. S. 1001, 86 S. Ct. 525, 15 L. Ed. 2d 491; *Minnesota Mining and Manufacturing Company v. New Jersey Wood Finishing Company*, 381 U. S. 311, 85 S. Ct. 1473, 14 L. Ed. 2d 405 (1965).

"Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.

. . . The broad aim of this enactment was to use 'private self-interest as a means of enforcement' of the antitrust laws." 381 U. S. at 318, 85 S. Ct. at 1477, 14 L. Ed. 2d at 411.

The Congressional policies emphasized in this Court's opinions in *Leh*, and in *Minnesota Mining* require the allowance of Petitioner's motion to intervene in the present action, there being no other prevailing contrary considerations involved. Moreover, this Court emphasized the necessity of allowing private litigants enough time after com-

pletion of a governmental proceeding to assess intelligently the government's case and evidence before deciding upon what course of action that private litigant will take. Quoting from the Senate Report on the 1955 amendment to Section 5(b) of the Clayton Act, the Third Circuit stated:

> "'Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit, if upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint,' Senate Report No. 619, June 21, 1955, U. S. Code Cong. and Ad. News, 84 Cong. 1st Sess. P. 2332." *New Jersey Food Finishing Co. v. Minnesota Mining and Manufacturing Company*, 332 F. 2d 346, 359 (3rd Cir. 1964).

Where, as here, there will be no delay to the proceedings and no prejudice to any party involved if the intervention is allowed, and where the application is made within the time period provided by Congress for bringing the particular action,[5] a denial of intervention is not only contrary to the dictates of Congress, but contravenes also Federal Rule Civil Procedure 1 in that the Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action."

In so narrowly construing F. R. C. P. 24, as amended, the Third Circuit's decision runs counter to the holding in *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.*, 386 U. S. 129, 87 S. Ct. 932, 17 L. Ed. 2d 814 (1967) and contravenes the policy and spirit of the underlying

5. See *State of New Jersey v. Morton Salt Co., et al.* — F. 2d — 1967 Trade Cases ¶ 72,300 (3rd Cir. 1967); *Hardy Salt Company v. State of Illinois*, 377 F. 2d 768 (8th Cir. 1967); *State of Michigan v. Morton Salt Co.*, 259 F. Supp. 35 (D. Minn. 4th Div. 1966).

principles of the *Leh* and *Minnesota Mining* decisions. See also *Atlantis Development Corp. v. U. S.*, 379 F. 2d 818 (5th Cir. 1967) and *U. S. v. First National Bank and Trust Co. of Lexington*, — F. Supp. —, 1967 Trade cases, ¶ 72,332 (E. D. Ky. 12-29-67) where the Court liberally construes and upholds the dictates of *Cascade, supra.*

2. When a class action under former F. R. C. P. 23(a)(3) has been held valid and the class is ordered closed at a later time, a member of that class who was aware of its existence but who received no notice, express or constructive of the closing, is unjustly disenfranchised of his rights to participate in the benefits of that class action. Otherwise, the class action device under former Rule 23 becomes a trap, in that members of the class who have knowledge that the action is pending, in most instances by publication of the opinion upholding the class,[6] are lulled into believing their rights are being protected and prosecuted.

The cases of *Escott v. Barchris Construction Corp., supra; Union Carbide and Carbon Corp. v. Nisley, supra,* and *York v. Guaranty Trust Co. of N. Y., supra,* all of which held that the applicable statute of limitations is tolled for all members of a class by the commencement of a spurious class action, recognize the danger of such a class action becoming a "trap" for unwary members of that class. In *York,* the Second Circuit held:

> "Any non-accepting note holders, relying on that assurance, were justified in believing that plaintiff's suit was begun on their behalf although they were not

6. In the instant case, the District Court's opinion upholding the class action was reported or publicized in at least the following sources: 248 F. Supp. 506 (E. D. Pa. 1965); 1965 CCH Trade Cases, ¶ 71,614; 9 F. R. Serv. 2d 23 a. 33, Case 4: 227 BNA Antitrust and Trade Regulation Report, p. A-10 (1965). In contrast, the class-closing order was not so reported or publicized.

before the Court. *To hold that such noteholders cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff, would be to convert the Rule [23(a)(3)] into a trap . . .* Those who do intervene will be no more barred by lapse of time than is the plaintiff, unless defendant can prove special facts affecting them." 143 F. 2d at 529. (Emphasis added.)

And in *Union Carbide, supra,* 300 F. 2d at p. 590, the Tenth Circuit, ruling in an antitrust action, cogently held:

"If a [spurious] class action is maintainable as such, it is incongruous to say that the absent members, who are represented by those present, may not rely upon the commencement of the action by their brethren to toll the running of the statute (of limitations). *This would only serve to convert the Rule [23] into a trap for those who have expeditiously allowed their rights to be maintained as a class action.*" (Emphasis added.)

In *Escott, supra,* 340 F. 2d at 733, the Second Circuit stated that "If we are to give recognition to the representative character of the action we must hold that the statute of limitations is tolled for those in whose behalf the representative action is brought as well as who actually bring the action." Accord: *Newberg v. American Dryer,* 195 F. Supp. 345 (E. D. Pa. 1961). In the case sub judice, the denial of Petitioner's intervention was not directed by the Court until long after the statute of limitations period had expired.[7] Petitioner, a member of the class, should

7. While it is true that Petitioner, as a prudent matter, did commence an independent antitrust action against rock salt suppliers within the statute of limitations period (*State of New York v. Morton Salt Co., et al.,* Civil Action No. 40919, E. D. Pa., commenced

not be unwaringly "trapped" from receiving the benefits of the class action by an Order of the District Court closing the class, of which Order it had no notice.

The Court below not only charged Petitioner with knowledge of the pendency of the class action, but also with constructive knowledge of the closing date of the class. This latter imputation of knowledge of the closing date is unsupported by the record and is contrary to fact. The Court below imputed this knowledge to Petitioner solely on the ground that Petitioner's "attorney general's name appeared on a timely intervention in this action by the New York Thruway Authority." (Appendix, 4a). New York State has thus been barred from participating in the class action by a remote imputation of knowledge by an appellate court which in turn was based on an unsupported assumption that intervenor New York State Thruway Authority knew of the purported closing date for the class when it filed for intervention on May 31, 1966. Clearly, logic and reason dictate that knowledge of a closing date cannot be imputed from this fact for there is not even a suggestion that the Attorney General of Petitioner may have known of or had reason to know of the closing date when the Thruway Authority's application for intervention was filed. In light of the foregoing, existence or nonexistence of such knowledge is irrelevant to the determination of timeliness. To any extent that such knowledge is deemed to be relevant, discovery should be taken on this point, so that facts, rather than an illogical supposition, can be established. Otherwise, Petitioner, the People of the

August 10, 1966), the Petitioner has been relying mainly on the prosecution of its claims in the principal class action in which Petitioner sought formal leave to intervene. The bringing of this independent action is irrelevant to the issues involved in this petition for certiorari and certainly Petitioner should not be penalized for its prudence and deprived of its rightful benefits as a member of the class action by virtue of its collateral proceeding.

State of New York, may be deprived of its substantial claim against violators of the antitrust laws by resort to an inference without support in fact or reason, and in any event, will lose the beneficial effects of the class action against those violators.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16557

CITY OF PHILADELPHIA, PENNSYLVANIA,
A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF
AND ALL OTHERS SIMILARLY SITUATED

v.

MORTON SALT COMPANY; PIONEER SALT COMPANY; SALT SERVICE INCORPORATED; INTERNATIONAL SALT COMPANY; CAYUGA ROCK SALT COMPANY AND DIAMOND CRYSTAL SALT COMPANY AND CARGILL INCORPORATED
STATE OF NEW YORK,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 19, 1967

Before HASTIE, FREEDMAN and SEITZ, *Circuit Judges.*

OPINION OF THE COURT.

(Filed November 6, 1967)

PER CURIAM.

Appellant, State of New York ("New York"), appeals from a denial of its motion for leave to intervene as a

tainly this ground alone would not justify a finding that the district court abused its descretion in denying the untimely intervention. The procedures and provisions fairly established by our courts are binding on public as well as private litigants.

If we consider New York's motion more broadly, it appears in no better position. New York's principal law officer, its attorney general, was chargeable with knowledge of the action. In fact an investigation was instituted by the attorney general of New York in 1960. In addition, the attorney general's name appeared on a timely intervention in this action by the New York Thruway Authority. Once it is concluded, as we have found here, that the closing date was reasonable, the burden was on New York to offer some reasonable excuse for its delay. This it did not do and so we need not delve into the possible prejudice to any of the defendants which might arise from the granting of the motion. In the total setting we cannot find that it was an abuse of discretion for the district court to deny the motion.

New York argues that the district court's order of February 14, 1966, amending the discovery schedule also, by implication, voided the date fixed for closing the class. We cannot so read it.

New York also argues that it was entitled to intervene as a matter of right under F. R. C. P. § 24(a)(2). This argument was not advanced below. But assuming that the matter is properly before us and further assuming that New York's claim is within the cited portion of the rule, the provision requires "timely application". As indicated, we think the district court in effect properly and necessarily held that the application was not timely.

We find no error in the judgment below and it will be affirmed.

EXCERPTS FROM RECORD.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, PENNSYLVANIA,
A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF
AND ALL OTHERS SIMILARLY SITUATED.

v.

MORTON SALT COMPANY
PIONEER SALT COMPANY
SALT SERVICE INCORPORATED
INTERNATIONAL SALT COMPANY
CAYUGA ROCK SALT COMPANY
DIAMOND CRYSTAL SALT COMPANY

COMPLAINT.

1. This complaint is filed and these proceedings are instituted on behalf of the City of Philadelphia and all other state and municipal governments, governmental agencies and governmental subdivisions similarly situated under Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731 (15 U. S. C. § 15), to recover treble damages and the cost of suit, including a reasonable attorneys' fee, against the defendants for the injuries sustained by plaintiff and other members of the class represented by it who may be permitted to intervene, by reason of defendants' violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, 210, (15 U. S. C. § 1, 2),

commonly known as the Sherman Act, as hereinafter alleged.

2. The City of Philadelphia, Pennsylvania, is a municipal corporation of the State of Pennsylvania.

3. Plaintiff is representative of a class, as defined by F. R. C. P. #23(a)(3), which is so numerous as to make it impracticable to bring them all before the Court, the class consisting of all state and municipal governments, governmental agencies and governmental subdivisions using rock salt for deicing and water softening purposes and generally purchasing rock salt by sealed bids, and which have been injured by the unlawful conspiracy hereinafter alleged. Plaintiff will fairly insure the adequate representation of the entire class, and brings this action on behalf of the entire class.

4. Each of the defendants transacts business and is found within the Eastern District of Pennsylvania.

5. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the state indicated and has its principal place of business in the city indicated. Within the period of time covered by this complaint, said defendants have engaged in the business of producing, distributing and/or selling rock salt throughout the United States:

Name of Corporation	*State of Incorporation*	*Principal Place of Business*
Morton Sale Company	Illinois	Chicago, Illinois
Pioneer Salt Company	Delaware	Philadelphia, Pennsylvania
Salt Service Incorporated	Pennsylvania	Philadelphia, Pennsylvania

Name of Corporation	*State of Incorporation*	*Principal Place of Business*
International Salt Company	New Jersey	Clarks Summit, Pennsylvania
Cayuga Rock Salt Company	New York	Myers, New York
Diamond Crystal Salt Company	Michigan	St. Clair, Michigan

6. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered or done by the officers, agents, employees or representatives of each defendant while actively engaged in the management, direction or control of its affairs, and acting on its behalf within the scope of their employment.

7. As used herein, "Rock Salt" means salt in a solid form existing in nature as a layer, bed or formation which is mined and pulverized into fine and coarse grades for many uses including deicing control and water softening.

8. A "Rock Salt producer" means a person, firm or corporation engaged in the business of mining and distributing rock salt.

9. A "Rock Salt distributor" means a person, firm or corporation engaged in the business of distributing rock salt which it has purchased from a rock salt producer.

10. As used herein, "Destination point" means the geographical location of the private, state or municipal purchaser of rock salt.

11. As used herein, "F. O. B. mine price" means the price of the rock salt at the mine.

12. As used herein, "Delivered price" means the price quoted to the purchaser consisting of the F. O. B. mine price of the rock salt plus transportation charges.

13. As used herein, "Deicing control" means the application of rock salt to the surface of roads and highways for purposes of removing snow and ice.

14. Defendants are principal rock salt producers, mining and distributing rock salt sold in the United States. The total sales of rock salt amounted to approximately $25,000,000 for the year 1960.

15. Rock salt is mined in five major areas in the country. These areas are located in the States of Louisiana, Kansas, Michigan, Ohio and New York. Defendants also operate mines, or purchase rock salt from mines, located in southern Canada. Rock salt is sold and shipped in interstate commerce by the defendants and others from these areas to other areas of the United States, including the City of Philadelphia and the State of Pennsylvania.

16. State and municipal agencies generally purchase rock salt, used primarily for deicing control, on a bid basis. A contract is awarded to the low bidder. Bidders are required by states and municipalities to quote delivered prices.

17. Rock salt is also sold and shipped in interstate commerce to most of the Cities and States in the United States, including the City of Philadelphia and the State of Pennsylvania, to private purchasers for use, among other, in meat packing and water softening processes and for agricultural processes such as salting livestock.

18. The F. O. B. mine prices are published figures and are known throughout the trade. The producers in each area have the same F. O. B. mine prices as their competitors in that area. There are three F. O. B. mine prices for the five producing areas. There are the Kansas price, the Louisiana price, and the Northern price which applies

to mines located in the States of Michigan, Ohio, New York and southern Canada. Truck and rail freight rates between the mines and all destination points are published by the Interstate Commerce Commission.

19. For many years last past, the exact date being to the Plaintiff unknown, but at least as early as 1957 and continuing to the present, the defendants and others to the Plaintiff unknown, have engaged in an unlawful combination and conspiracy to establish, maintain, stabilize and fix the prices of rock salt, in unreasonable restraint of the hereinbefore described trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", c. 647, 26 Stat. 209, as amended (15 U. S. C., Sec. 1) commonly known as the Sherman Act.

20. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants, and others to the Plaintiff unknown, the substantial terms of which have been and are that they agree:

(a) to fix the prices of rock salt to be sold to private and municipal purchasers;

(b) to quote list prices on rock salt bids to municipal and state authorities;

(c) to adhere to an industry established multiple basing point or zone pricing formula which fixes the delivered prices to each destination point in the United States;

(d) to communicate with each other for the purpose of exchanging information concerning F. O. B. mine prices, transportation charges and other infor-

mation incidental to fixing delivered prices to be submitted as bids to state and municipal purchasers; and

(e) to notify competing producers in advance of any contemplated change in the F. O. B. mine prices of rock salt.

21. The aforesaid combination and conspiracy has had the effects among others, of:

(a) resulting in identical bids for the award of contracts covering the rock salt requirements of state and municipal Governments throughout most of the states in the United States; and

(b) forcing state, municipal and private purchasers to pay high, arbitrary and non-competitive prices for rock salt produced and sold by the defendants and the co-conspirators.

22. On July 11, 1961, the United States of America instituted Civil Action No. 4-61-Civil 162 in the United States District Court for the District of Minnesota, Fourth Division, against the defendants Morton Salt Company, International Salt Company and Diamond Crystal Salt Company. By said complaint, the United States charged that for the past several years and continuing until sometime in 1961, defendants engaged in an unlawful combination and conspiracy in restraint of interstate trade and commerce in rock salt in violation of Section 1 of the Sherman Act, and further charged that said combination and conspiracy consisted of a continuing agreement to fix prices and submit collusive bids to governmental agencies and corporations in connection with the sale of Rock Salt. The United States further charged therein that defendants, for the purpose of forming and effectuating said combination and conspiracy had done, among other things, those acts alleged herein in paragraph 20.

23. During the period from July 1957 to June 1962 Plaintiff purchased rock salt from Defendants, Morton Salt Company, Pioneer Salt Company and Salt Service Incorporated in a total amount of $655,701.51.

24. By reason of Defendants' conspiracy hereinabove alleged, Plaintiff's aforesaid purchases were made at prices higher than the prices which plaintiff would have had to pay under natural conditions of competition in the absence of any such conspiracy, and Plaintiff has thereby been injured and damaged. Plaintiff is unable to state its damages with precision at the present time, since its determination will require discovery of and an analysis of and accounting from Defendants' books and records.

WHEREFORE, Plaintiff requests that judgment be entered in its favor in threefold the amount of the damages determined to have been sustained by Plaintiff, together with the cost of suit, including a reasonable attorneys' fee.

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City Solicitor, City of Philadelphia
Counsel.

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DAVID BERGER,
By DAVID BERGER,
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Philadelphia, Pennsylvania 19103
Special Counsel for City of Philadelphia.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, PENNSYLVANIA, A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED

v.

MORTON SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE INCORPORATED,
INTERNATIONAL SALT COMPANY,
CAYUGA ROCK SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY,
CARGILL, INCORPORATED.

ORDER GRANTING MOTION TO AMEND THE COMPLAINT AND GRANTING MOTIONS TO INTERVENE.

AND NOW, TO WIT, this 12th day of May, 1965, it is ORDERED AND DECREED that the motion filed on February 10, 1965 to amend the complaint of the City of Philadelphia on behalf of itself and all other state and municipal govern-

ments, governmental agencies and governmental subdivisions similarly situated is granted.

IT IS FURTHER ORDERED AND DECREED that the motions to intervene as party plaintiffs in this action are granted as to the following:

CONNECTICUT:

Stamford

MAINE:

Augusta
Bangor
Bath
Brewer
Brunswick
Bucksport
Cape Elizabeth
Caribou
Farmington
Freeport
Gardiner
Houlton
Kennebunk
Lewiston
Limestone
Lisbon
Millinocket
Portland
Presque Isle
Rockland
Scarborough
Skowhegan
South Portland
Town of Falmouth
Waterville
Westbrook
Wilton
Windham
Yarmouth

MARYLAND:

Baltimore

MASSACHUSETTS:

Boston

MICHIGAN:

Bay City
Boards of County Road Commissionsrs of Macomb, Muskegon, Oakland, Washtenau and Wayne
Dearborn
Detroit
Grand Haven
Grand Rapids
Holland
Lansing
Livonia
Saginaw
Wyoming

NEW JERSEY:

Irvington

NEW YORK:

New York City
New York City Transit Authority
Port of New York Authority
Town of Oyster Bay, L. I.

PENNSYLVANIA:

Allegheny County
Borough of Monroeville
Commonwealth of Pennsylvania
Easton
Hazleton
Pittsburgh
Whitehall Borough

Each above mentioned intervenor may serve its complaint on the defendants in this action by service on their counsel of record therein.

This order is without prejudice to the rights, if any, asserted by Cayuga Rock Salt Company in its objections to the motions to intervene, upon which objections the court expresses no opinion at this time, and also it expresses no opinion in reference to Cayuga Rock Salt Company's motion to dismiss the independent suits filed under different numbers in this court.

/s/ Allan K. Grim, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, PENNSYLVANIA,
A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

AND

COMMONWEATH OF PENNSYLVANIA,
NEW YORK CITY,
NEW YORK PORT AUTHORITY,
CITY OF DETROIT, MICHIGAN,
BOARD OF COUNTY ROAD COMMISSIONERS OF THE COUNTY OF WAYNE, MICHIGAN, AND ALL OTHER PARTS LISTED IN EXHIBIT A TO AMENDED COMPLAINT,

Intervenor Plaintiffs

v.

MORTON SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE INCORPORATED,
INTERNATIONAL SALT COMPANY,
CAYUGA ROCK SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY,
CARGILL, INCORPORATED.

AMENDED COMPLAINT.

Jury Trial Demanded.

1. This Amended Complaint is filed and these proceedings are instituted on behalf of the plaintiff City of Philadelphia and all other state and municipal governments, governmental agencies and governmental subdivisions similarly situated and intervenor plaintiffs Commonwealth of Pennsylvania, New York City, New York Port Authority, City of Detroit, Michigan, Board of County Road Commissioners of the County of Wayne, Michigan, and all other parties listed in Exhibit A to Amended Complaint, under Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731 (15 U. S. C. § 15), to recover treble damages and the cost of suit, including reasonable attorneys' fees, against the defendants for the injuries sustained by plaintiff, intervenor plaintiffs and other members of the class who may be permitted to intervene, by reason of defendants' violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647 Stat. 209, 210, (15 U. S. C. § 1, 2), commonly known as the Sherman Act, as hereinafter alleged.

2. The City of Philadelphia, Pennsylvania, is a municipal corporation of the State of Pennsylvania.

3. Plaintiff is representative of a class, as defined by F. R. C. P. 23(a)(3), which is so numerous as to make it impracticable to bring them all before the Court, the class consisting of all state and municipal governments, governmental agencies and governmental subdivisions using rock salt for deicing and water softening purposes and generally purchasing rock salt by sealed bids, and which have been injured by the unlawful conspiracy hereinafter alleged.

Plaintiff will fairly insure the adequate representation of the entire class, and brings this action on behalf of the entire class.

4. Intervenor plaintiffs are public bodies corporate, and/or municipal corporations, and/or states of the United States as indicated in Exhibit A attached to this Amended Complaint, incorporated by reference herein and made part hereof. Each intervenor plaintiff is a member of the class represented by the plaintiff in above action, as set forth more fully herein in Paragraph 3 above.

5. Each of the defendants transacts business and is found within the Eastern District of Pennsylvania.

6. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the state indicated and has its principal place of business in the city indicated. Within the period of time covered by this Amended Complaint, said defendants have engaged in the business of producing, distributing and/or selling rock salt throughout the United States:

Name of Corporation	*State of Incorporation*	*Principal Place of Business*
Morton Salt Company	Illinois	Chicago, Illinois
Pioneer Salt Company	Delaware	Philadelphia, Pennsylvania
Salt Service Incorporated	Pennsylvania	Philadelphia, Pennsylvania
International Salt Company	New Jersey	Clarks Summit, Pennsylvania

Name of Corporation	*State of Incorporation*	*Principal Place of Business*
Cayuga Rock Salt Company	New York	Myers, New York
Diamond Crystal Salt Company	Michigan	St. Clair, Michigan
Cargill, Incorporated	Delaware	Minneapolis, Minnesota

7. The acts alleged in this Amended Complaint to have been done by each of the defendants were authorized, ordered or done by the officers, agents, employees or representatives of each defendant while actively engaged in the management, direction or control of its affairs, and acting on its behalf within the scope of their employment.

8. As used herein, "Rock Salt" means salt in a solid form existing in nature as a layer, bed or formation which is mined and pulverized into fine and coarse grades for many uses including deicing control and water softening.

9. A "Rock Salt producer" means a person, firm or corporation engaged in the business of mining and distributing rock salt.

10. A "Rock Salt distributor" means a person, firm or corporation engaged in the business of distributing rock salt which it has purchased from a rock salt producer.

11. As used herein, "Destination point" means the geographical location of the private, state or municipal purchaser of rock salt.

12. As used herein, "F. O. B. mine price" means the price of the rock salt at the mine.

13. As used herein, "Delivered price" means the price quoted to the purchaser consisting of the F. O. B. mine price of the rock salt plus transportation charges.

14. As used herein, "Deicing control" means the application of rock salt to the surface of roads and highways for purposes of removing snow and ice.

15. Defendants are principal rock salt producers, mining and distributing rock salt sold in the United States. The total sales of rock salt amounted to approximately $25,000,000 for the year 1960.

16. Rock salt is mined in five major areas in the country. These areas are located in the States of Louisiana, Kansas, Michigan, Ohio and New York. Defendants also operate mines, or purchase rock salt from mines, located in southern Canada. Rock salt is sold and shipped in interstate commerce by the defendants and others from these areas to other areas of the United States, including but not limited to the Ctiy of Philadelphia, Commonwealth of Pennsylvania, and various cities and public bodies corporate situated throughout the United States.

17. State and municipal agencies generally purchase rock salt, used primarily for deicing control, on a bid basis. A contract is awarded to the low bidder. Bidders are required by states and municipalities to quote delivered prices.

18. Rock salt is also sold and shipped in interstate commerce to most of the cities and states in the United States, including the Ctiy of Philadelphia and the State of Pennsylvania, to private purchasers for use, among other, in meat packing and water softening processes and for agricultural processes such as salting livestock.

19. The F. O. B. mine prices are published figures and are known throughout the trade. The producers in each area have the same F. O. B. mine prices as their competitors in that area. There are three F. O. B. mine prices

for the five producing areas. There are the Kansas price, the Louisiana price, and the Northern price which applies to mines located in the States of Michigan, Ohio, New York and southern Canada. Truck and rail freight rates between the mines and all destination points are published by the Interstate Commerce Commission.

20. For many years last past, the exact date being to the plaintiff and intervenor plaintiffs unknown, but at least as early as 1957 and continuing to the present, the defendants and others to the plaintiff and intervenor plaintiffs unknown have engaged in an unlawful combination and conspiracy to establish, maintain, stabilize and fix the prices of rock salt, in unreasonable restraint of the hereinbefore described trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," c. 647, 26 Stat. 209, as amended (15 U. S. C., Sec. 1) commonly known as the Sherman Act.

21. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants, and others to the plaintiff and intervenor plaintiffs unknown, the substantial terms of which have been and are that they agree:

(a) to fix the prices of rock salt to be sold to private and municipal purchasers;

(b) to quote list prices on rock salt bids to municipal and state authorities;

(c) to adhere to an industry established multiple basing point or zone pricing formula which fixes the delivered prices to each destination point in the United States;

(d) to communicate with each other for the purpose of exchanging information concerning F. O. B.

mine prices, transportation charges and other information incidental to fixing delivered prices to be submitted as bids to state and municipal purchasers; and

(e) to notify competing producers in advance of any contemplated change in the F. O. B. mine prices of rock salt.

22. The aforesaid combination and conspiracy has had the effects among others, of:

(a) resulting in identical bids for the award of contracts covering the rock salt requirements of state and municipal governments throughout most of the states in the United States; and

(b) forcing state, municipal and private purchasers to pay high, arbitrary and non-competitive prices for rock salt produced and sold by the defendants and the co-conspirators.

23. The aforesaid combination and conspiracy necessitated frequent communications among defendants and the co-conspirator companies. These communications were made under the cover of legitimate trade practices. As a result of said communications and other acts done by defendants and the co-conspirator companies for the purpose of actively and fraudulently concealing the existence of the aforesaid combination and conspiracy, plaintiff and intervenor plaintiffs neither had knowledge, nor by the exercise of reasonable diligence could they have learned, of the existence of such combination and conspiracy until they first became aware of the government proceedings in July, 1961, as hereinafter set forth in Paragraph 24 of this Amended Complaint.

24. On July 11, 1961, the United States of America instituted Civil Action No. 4-61-Civil 162 in the United

States District Court for the District of Minnesota, Fourth Division, against the defendants Morton Salt Company, International Salt Company and Diamond Crystal Salt Company. By said complaint, the United States charged that for the past several years and continuing until sometime in 1961, defendants engaged in an unlawful combination and conspiracy in restraint of interstate trade and commerce in rock salt in violation of Section 1 of the Sherman Act, and further charged that said combination and conspiracy consisted of a continuing agreement to fix prices and submit collusive bids to governmental agencies and corporations in connection with the sale of rock salt. The United States further charged therein that defendants, for the purpose of forming and effectuating said combination and conspiracy had done, among other things, those acts alleged herein in Paragraph 21.

25. On August 6, 1964, the Court found the defendants Morton Salt Company and Diamond Crystal Salt Company guilty of price fixing by agreeing to and effectuating a plan to submit non-competitive uniform prices to government agencies. The Court found that these results had been achieved by meetings among the defendants, telephone calls and otherwise with the aim of supporting adherence to the agreed plan. On November 24, 1964, Findings of Fact and Conclusions of Law were entered and on the same day a Final Judgment was entered enjoining certain acts of the defendants.

26. During the period from July 1957 to June 1962, plaintiff purchased rock salt from defendants, Morton Salt Company, Pioneer Salt Company and Salt Service Incorporated in a total amount of $655,701.51.

27. During the period as set forth in Paragraph 20 of this Amended Complaint, intervenor plaintiffs purchased

rock salt in substantial sums from one or more of defendants or other co-conspirators participating with defendants in the aforesaid combination and conspiracy.

28. By reason of defendants' conspiracy hereinabove alleged, plaintiff's and intervenor plaintiffs' aforesaid purchases were made at prices higher than the prices which plaintiff and intervenor plaintiffs would have had to pay under natural conditions of competition in the absence of any such conspiracy, and plaintiff and intervenor plaintiffs have thereby been injured and damaged. Plaintiff and intervenor plaintiffs are unable to state their damages with precision at the present time, since this determination will require discovery of and analysis of and an accounting from defendants' books and records.

WHEREFORE, plaintiff and intervenor plaintiffs pray that a joint and several judgment be entered in their favor and in favor of the entire class against the defendants in the amount of threefold the damages sustained by plaintiff and intervenor plaintiffs as a result of defendants' violations of the antitrust laws alleged, together with such interest thereon as is permitted by law, and their costs of suit, including reasonable attorneys' fees.

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Oyster Bay, New York
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Exhibit A to Amended Complaint.

SCHEDULE OF INTERVENING PLAINTIFFS

In Civil Action No. 33781 as of May 14, 1965.

I. STATES

Commonwealth of Pennsylvania

II. MUNICIPAL CORPORATIONS AND POLITICAL SUBDIVISIONS

Connecticut:

Stamford

Maine:

Augusta
Bangor
Bath
Brewer
Brunswick
Bucksport
Cape Elizabeth
Caribou
Farmington
Freeport
Gardiner
Houlton
Kennebunk
Lewiston
Limestone
Lisbon
Millinocket
Portland
Presque Isle
Rockland
Scarborough
Skowhegan
South Portland
Town of Falmouth
Waterville
Westbrook
Wilton
Windham
Yarmouth

Maryland:

Baltimore

Massachusetts:

Boston

Michigan:

Bay City
Dearborn
Detroit
Grand Haven
Grand Rapids
Holland
Lansing
Livonia
Saginaw
Wyoming

New Jersey:

Irvington

New York:

New York City
Town of Oyster Bay, L. I.

Pennsylvania:

Allegheny County
Borough of Monroeville
Easton
Hazleton
Pittsburgh
Whitehall Borough

III. Public Bodies Corporate

Michigan:

Board of County Road Commissioners of Macomb County
Board of County Road Commissioners of Muskegon County
Board of County Road Commissioners of Oakland County

Board of County Road Commissioners of Washtenaw County
Board of County Road Commissioners of Wayne County

New York:

New York City Transit Authority
Port of New York Authority

Certificate of Service.

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record for the defendants as follows:

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DAVID BERGER
David Berger

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff

and

COMMONWEALTH OF PENNSYLVANIA, ET AL.
Intervenor Plaintiffs

v.

MORTON SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE, INCORPORATED,
INTERNATIONAL SALT COMPANY,
CAYUGA ROCK SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY,
CARGILL, INCORPORATED.

ORDER OF COURT THAT "CLASS" WILL BE CLOSED 6/1/66.

AND NOW, this 7th day of December, 1965, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. The class as defined in plaintiff's and intervenor plaintiffs' Amended Complaint will be closed on June 1, 1966. No additional parties plaintiff will be permitted to intervene in this action after June 1, 1966.

2. June 1, 1966 will also mark the terminal date on or before which all parties must complete their discovery.

ALLAN K. GRIM, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NOS. 33781, ET AL.

CITY OF PHILADELPHIA, ET AL.

v.

MORTON SALT COMPANY, ET AL.
AND ALL RELATED CASES PENDING IN THIS DISTRICT.

PRE-TRIAL ORDER.

AND Now, to wit, this 14th day of February, 1966, hearings having been held in both Minneapolis and Philadelphia for the purpose of determining the orders of and dates upon which plaintiffs shall depose witnesses of the defendants in pre-trial procedures in the "rock salt cases", and proposed Schedules having been submitted in both Minneapolis and Philadelphia, and hearing held thereon; and the Court having considered plaintiffs' and defendants' views as expressed, either written or orally, it is now ORDERED, ADJUDGED AND DECREED that the following Order be entered in all of the pending rock salt cases in this District:

1. A schedule of witnesses to be deposed by plaintiffs and the dates of taking of such depositions is attached hereto and labeled Schedule "A". Said Schedule shall constitute notice of the taking of depositions in conformity with the Federal Rules of Civil Procedure, except as otherwise provided herein.

2. The depositions listed will be taken in Minneapolis, Minnesota, or Philadelphia, Pennsylvania, at such Federal courtroom or place to be provided by the Court. The depositions will be taken in the order and at the times and places indicated on Schedule "A", except as the Court may otherwise order, or by agreement of all the parties.

3. If there is any problem concerning the availability of any present employee or officer of any of the defendants, by reason of age or health, such defendant will file a statement reflecting such problem with the Court, either by February 25, 1966 or within five days of the date of this Order, whichever is later. As to former employees, each defendant will file within the same period of time a statement of such employee's last known address or location and, if known, his age, state of health, and present position.

4. Plaintiffs will serve a notice for the taking of the depositions of all witnesses not employed by the defendants by March 8, 1966. Such notice will provide that plaintiffs shall advance to each witness his necessary transportation expense, a per diem of $15.00, and reasonable expenses of lodging not to exceed $12.00 per day for each day that he is present for depositions.

5. If any party wishes to move for the release of a witness's testimony before a Grand Jury other than such portions that may have been read into the record in U. S. v. Morton, et al., 4-61 Crim. 65 (District of Minnesota), a copy of said motion shall be served upon the United States Attorney of the District in which the motion is made, and such motion shall be heard by this Court and decision rendered thereon on an ad hoc basis.

6. Each deposition taken pursuant to this Order shall be governed by Rule 26 of the Federal Rules of Civil Pro-

cedure, and may be used by or against any party who is present or represented at the taking of such deposition or had notice thereof, except that where the defendant adverse party agrees to and does produce the witness for examination at trial, the deposition of such witness will not be admissible as direct testimony.

7. Lead counsel who shall conduct the initial examination of present or former employees of defendants Morton, Diamond, International, Carey, Cutler-Mager, Cargill and Cargo Carriers shall be Maxine Boord Virtue, David Berger, and Robert A. Albrecht. Lead counsel for the depositions of officials of defendants, Hardy, Barton, American and Gunter shall be Robert R. Northcutt and William E. Mullin. Lead counsel may assign other counsel as lead counsel to take the initial examination of particular deponents. There shall be but one lead counsel for the deposition of each deponent. After the conclusion of the initial examination of each witness by lead counsel, other counsel may examine the witness, including further development of lines of questioning previously opened, provided that such counsel shall not engage in unnecessary repetition.

8. The original transcript of the testimony of each deponent shall be corrected and signed by the witness within forty-five (45) days of presentation of the transcript to the witness, unless signature is waived by the deponent and by all parties present at the deposition. If signature is waived, no party in any of the above actions may object to the admissibility of the deposition for lack of a signature.

9. Within forty-five (45) days after the transcript of the last deposition to be taken pursuant to Schedule "A" has been mailed by the reporter to all those parties who had ordered copies by five (5) days following the taking of

testimony, all parties desiring further interrogation of one or more of the witnesses shall make written application to the Court therefor, specifying the names of the witnesses, the subject matter and necessity for additional inquiry. Copies of the application shall be served by mail upon counsel for all parties in the above actions. Within ten (10) days of service thereof, response to such application shall be filed and served as provided above. In the event that the Court determines that recall of a witness is appropriate, it will schedule the recall deposition on the first available date thereafter not in conflict with Schedule "A".

10. In the absence of application for further interrogation within the time provided therefor, no further interrogation of the witness by any party receiving notice of the deposition shall be permitted, except upon further Order of the Court on good cause shown.

11. If any of the depositions listed in Schedule "A" be rescheduled by the Court or by agreement of counsel, prompt notice shall be given to all parties by mail or telegraph.

12. Each defendant and each present employee of defendant will produce for plaintiffs' inspection at each deposition the following documents, except as the same may have been produced for plaintiffs' inspection heretofore:

A. Expense accounts of the deponent for the period of time from January 1, 1953 to June 28, 1961;

B. All documents taken to or received or prepared at any meeting relating to prices or bids attended by the individual deponent and any employee, agent, or representative of any other salt producer or distributor, including all memoranda, reports, notes of tele-

phone conversations, instructions, orders to subordinates, or other documents concerning any meeting described herein.

13. Copies of depositions shall be filed in each District in which these cases are pending.

14. All previous Orders heretofore entered in any of the cases pending in this District, insofar as inconsistent with the above, are hereby VACATED AND SET ASIDE.

By THE COURT:

THOMAS J. CLARY, *Ch. J.*
JOSEPH S. LORD, III, *J.*

DEPOSITIONS.

SCHEDULE "A".

Witness	*Company*	*Date*	*Place*
1. Raymond W. King	Cargill	March 15, 1966	Minneapolis
2. F. Clayton Tonnemaker	Cargill	March 16 & 17, 1966	Minneapolis
3. L. Starr Killen	Cargill	March 17 & 18, 1966	Minneapolis
4. Edson K. Green	International	March 22, 23 & 24, 1966	Philadelphia
5. Ralph Haberle	International	March 29 & 30, 1966	Philadelphia
6. D. J. Daniels	International	March 30, 1966	Philadelphia
7. Paul S. Trible	International	March 30, 1966	Philadelphia
8. Ed Fuller	International	March 31, 1966	Philadelphia
9. Maxwell M. Lenhoff	International	March 31, 1966	Philadelphia
10. Joseph R. White	International	April 5, 1966	Philadelphia
11. A. S. Hunter	International	April 6, 1966	Philadelphia
12. Arthur R. Armstrong	International	April 6, 1966	Philadelphia

Witness	*Company*	*Date*	*Place*
13. H. Way Conn	Morton	April 7, 1966	Philadelphia
14. Paul LaLiberte	Cutler-Magner	April 19, 1966	Minneapolis
15. Frank Crane	Morton	April 20, 1966	Minneapolis
16. Flavel Beattie	Morton	April 20 & 21, 1966	Minneapolis
17. Elias Ekman	Morton	April 26, 27 & 28, 1966	Minneapolis
18. Herbert R. Stratford	Morton	April 28, 1966	Minneapolis
19. Geedes Carrington	Morton	May 3, 1966	Minneapolis
20. J. Byron Page	Morton	May 3, 1966	Minneapolis
21. Daniel Peterkin	Morton	May 4, 1966	Minneapolis
22. Charles F. Forgue	Morton	May 5, 1966	Minneapolis
23. John M. Rankin	Morton	May 10, 1966	Minneapolis
24. Spencer Meilstrup	Diamond	May 12, 1966	Minneapolis
25. H. L. Kirby	Diamond	May 12, 1966	Minneapolis
26. Charles F. Moore	Diamond	May 17 & 18, 1966	Minneapolis
27. J. B. Smith	Diamond	May 19 & 20, 1966	Minneapolis

Witness	*Company*	*Date*	*Place*
28. Whittaker H. Lonsdale	Diamond	May 24, 1966	Minneapolis
29. Edward M. Dodd	Diamond	May 25 & 26, 1966	Minneapolis
30. C. E. Boyce	Diamond	May 26, 1966	Minneapolis
31. Carroll C. Sargent	Carey	June 2, 1966	Minneapolis
32. Lloyd Winslow	Carey	June 2, 1966	Minneapolis
33. Howard J. Carey, Jr.	Carey	June 3 & 4, 1966	Minneapolis
34. Blakely Jordan	Diamond	June 14, 15 & 16, 1966	Minneapolis
35. William Price	International	June 21, 22 & 23, 1966	Philadelphia
36. Lewis T. Hardy	Hardy	July 6, 1966	Minneapolis
37. Raymond P. Hawley	Hardy	July 7, 1966	Minneapolis
38. Joe Gorsky	Barton	July 8, 1966	Minneapolis
39. Kermit C. Voss	Barton	July 12, 1966	Minneapolis
40. H. H. Moseley	American	July 13, 1966	Minneapolis
41. D. S. Doores	American	July 14, 1966	Minneapolis
42. Gerald S. Gunther	Gunther	July 15, 1966	Minneapolis

Minneapolis—Courtroom #2, Federal Courts Building, Fourth & Marquette
Philadelphia—Courtroom #7, U. S. Courthouse, 9th and Market Streets.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, PENNSYLVANIA, A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

v.

MORTON SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE INCORPORATED,
INTERNATIONAL SALT COMPANY,
CAYUGA ROCK SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY.

MOTION OF THE NEW YORK STATE THRUWAY AUTHORITY FOR LEAVE TO INTERVENE AS A PARTY PLAINTIFF.

Intervenor plaintiff, New York State Thruway Authority, a public corporation organized under the laws of the State of New York, respectfully moves the Court, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for leave to intervene as a party plaintiff in the above-captioned class action, and in support thereof avers the following:

1. Intervenor plaintiff is a public corporation organized and existing under the laws of the State of New York. It is a member of the class represented by the plaintiff in the above action, said class consisting of all state and municipal governments, governmental agencies and governmental subdivisions using rock salt for deicing and water

softening purposes and generally purchasing rock salt by sealed bids.

2. Intervenor plaintiff has made purchases from defendants of the products which are the subject of said action, as indicated in its proposed complaint, of which copies are annexed as Exhibit 1.

3. The aforesaid purchases were made at prices illegally increased by defendants' conspiracies, and intervenor plaintiff has been damaged thereby.

4. Intervenor plaintiff's claims involve questions of law and fact in common with those in the pending action.

WHEREFORE, intervenor plaintiff requests that it be permitted to intervene as a party plaintiff in said action and to file and serve its proposed complaint on the defendants therein.

DAVID BERGER,
David Berger,
2220 Phila. Saving Fund Bldg.,
Philadelphia, Pennsylvania,

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
State Capitol,
Albany, New York,
Attorneys for Plaintiff and Intervenor Plaintiffs.

Of Counsel:
HERBERT B. NEWBERG,
HAROLD GREENBERG,
H. LADDIE MONTAGUE, JR.,
COHEN, SHAPIRO, BERGER & COHEN,
2220 Phila. Saving Fund Bldg.,
Phila., Pa.

Exhibit 1 to Motion.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, PENNSYLVANIA, A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff

and

NEW YORK STATE THRUWAY AUTHORITY,
Intervenor Plaintiff

v.

MORTON SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE INCORPORATED,
INTERNATIONAL SALT COMPANY,
CAYUGA ROCK SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY,
Defendants.

COMPLAINT OF INTERVENOR PLAINTIFF, NEW YORK STATE THRUWAY AUTHORITY.

Jury Trial Demanded.

1. Intervenor plaintiff is a public corporation organized and existing under the laws of the State of New York.

It is a member of the class represented by the plaintiffs in the above action, said class consisting of all state and municipal governments, governmental agencies and governmental subdivisions using rock salt for deicing and water softening purposes and generally purchasing rock salt by sealed bids.

2. Intervenor plaintiffs incorporate herein by reference paragraphs 1, 4 to 23 inclusive, 27 and 28 of the Amended Complaint inserting the words "Intervenor Plaintiff" in lieu of the words "Intervenor Plaintiffs" wherever they appear in said paragraphs other than in paragraph 1.

3. During the period as set forth in paragraph 20 of the Amended Complaint, intervenor plaintiff purchased rock salt in substantial sums from one or more of defendants or other co-conspirators participating with defendants in the aforesaid combination and conspiracy.

4. For the duration of defendants' conspiracy and by reason of such conspiracy hereinabove alleged, intervenor plaintiff's aforesaid purchases were made at prices higher than the prices which intervenor plaintiff would have had to pay under natural conditions of competition in the absence of any such conspiracy, and intervenor plaintiff has thereby been injured and damaged. Intervenor plaintiff is unable to state its damages with precision at the present time, since its determination will require discovery of and an analysis of and an accounting from defendants' books and records.

WHEREFORE, intervenor plaintiff requests that judgment be entered in its favor in threefold the amount of the

damages determined to have been sustained by intervenor plaintiff, together with the cost of suit, including a reasonable attorneys' fee.

DAVID BERGER
David Berger
2220 Phila. Saving Fund Bldg.,
Philadelphia, Pennsylvania,

Louis J. Lefkowitz
Attorney General of the State
of New York,
State Capitol
Albany, New York
Attorneys for Plaintiff and Intervenor Plaintiffs

Of Counsel:

Herbert B. Newberg
Harold Greenberg
H. Laddie Montague, Jr.
Cohen, Shapiro, Berger & Cohen
2220 Phila. Saving Fund Bldg.
Philadelphia, Pennsylvania

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 33781.

CITY OF PHILADELPHIA, PENNSYLVANIA,
A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

v.

MORTON SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE INCORPORATED,
INTERNATIONAL SALT COMPANY,
CAYUGA ROCK SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY.

ORDER OF MAY 31, 1966.

AND NOW, to wit, this 31st day of May, 1966, it is hereby ORDERED AND DECREED that the Motion of the New York State Thruway Authority, a public corporation organized under the laws of the State of New York, to intervene as a party plaintiff in the above-captioned action is hereby granted, and that the said intervenor plaintiff may serve its complaint on the defendants in said action by service on its counsel of record therein.

JOSEPH S. LORD, III, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, PENNSYLVANIA,
A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

v.

MORTON SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE INCORPORATED,
INTERNATIONAL SALT COMPANY,
CAYUGA ROCK SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY,

FORM OF ORDER.

AND Now, to wit, this day of , 1966, it is hereby ORDERED AND DECREED that the Motion of the State of New York to intervene as a party plaintiff in the above-captioned action is hereby granted, and that the said intervenor plaintiff may serve its complaint on the defendants in said action by service on their counsel of record therein.

J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, PENNSYLVANIA,
A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,

v.

MORTON SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE INCORPORATED,
INTERNATIONAL SALT COMPANY,
CAYUGA ROCK SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY.

MOTION OF THE STATE OF NEW YORK FOR LEAVE TO INTERVENE AS PARTY PLAINTIFF.

Intervenor plaintiff, the State of New York, respectfully moves the Court, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for leave to intervene as a party plaintiff in the above-captioned class action, and in support thereof avers the following:

1. Intervenor plaintiff is the State of New York, a member of the class represented by the plaintiff in the above action, said class consisting of all state and municipal governments, governmental agencies and governmental subdivisions using rock salt for deicing and water softening purposes and generally purchasing rock salt by sealed bids.

2. Intervenor plaintiff has made purchases from defendants of the products which are the subject of said ac-

tion, as indicated in its proposed complaint, of which copies are annexed as Exhibit 1.

3. The aforesaid purchases were made at prices illegally increased by defendants' conspiracies, and intervenor plaintiff has been damaged thereby.

4. Intervenor plaintiff's claims involve questions of law and fact in common with those in the pending action.

WHEREFORE, intervenor plaintiff requests that it be permitted to intervene as a party plaintiff in said action and to file and serve its proposed complaint on the defendants therein.

DAVID BERGER,
David Berger,
2220 Philadelphia Saving Fund Bldg.,
Philadelphia, Pennsylvania,

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,

RUTH KESSLER TOCH,
Acting Solicitor General of the State of New York,
State Capitol,
Albany, New York,
Attorneys for Plaintiff and Intervenor Plaintiffs.

Of Counsel:

HERBERT B. NEWBERG
HAROLD GREENBERG
H. LADDIE MONTAGUE, JR.
COHEN, SHAPIRO, BERGER & COHEN
2220 Phila. Saving Fund Bldg.
Phila., Pa.

Exhibit 1 to Motion to Intervene.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, PENNSYLVANIA,
A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff

and

STATE OF NEW YORK,
Intervenor Plaintiff

v.

MORTON SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE INCORPORATED,
INTERNATIONAL SALT COMPANY,
CAYUGA ROCK SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY.

COMPLAINT OF INTERVENOR PLAINTIFF STATE OF NEW YORK.

Jury Trial Demanded.

1. Intervenor plaintiff is the State of New York, a member of the class represented by the plaintiffs in the above action, said class consisting of all state and municipal governments, governmental agencies and governmental subdivisions using rock salt for deicing and water softening purposes and generally purchasing rock salt by sealed bids.

2. Intervenor plaintiff incorporates herein by reference paragraphs 1, 4 to 25 inclusive, 27 and 28 of the Amended Complaint inserting the words "Intervenor Plaintiff" in lieu of the words "Intervenor Plaintiffs" wherever they appear in said paragraphs other than in paragraph 1.

3. During the period as set forth in paragraph 20 of the Amended Complaint, intervenor plaintiff purchased rock salt in substantial sums from one or more of defendants or other co-conspirators participating with defendants in the aforesaid combination and conspiracy.

4. For the duration of defendants' conspiracy and by reason of such conspiracy hereinabove alleged, intervenor plaintiff's aforesaid purchases were made at prices higher than the prices which intervenor plaintiff would have had to pay under natural conditions of competition in the absence of any such conspiracy, and intervenor plaintiff has thereby been injured and damaged. Intervenor plaintiff is unable to state its damages with precision at the present time, since its determination will require discovery of and an analysis of and an accounting from defendants' book and records.

WHEREFORE, intervenor plaintiff requests that judgment be entered in its favor in threefold the amount of the damages determined to have been sustained by intervenor plaintiff, together with the cost of suit, including a reasonable attorneys' fee.

DAVID BERGER,
David Berger,
2220 Philadelphia Saving Fund Bldg.,
Philadelphia, Pennsylvania,

LOUIS J. LEFKOWITZ, Attorney General
of the State of New York,
RUTH KESSLER TOCH, Acting Solicitor
General of the State of New York,
State Capitol,
Albany, New York,
Attorneys for Plaintiff and
Intervenor Plaintiffs.

Of Counsel:

HERBERT B. NEWBERG,
HAROLD GREENBERG,
H. LADDIE MONTAGUE, JR.,
COHEN, SHAPIRO, BERGER & COHEN,
2220 Phila. Saving Fund Bldg.,
Phila., Pa.

I hereby certify that a copy of the foregoing document was mailed to the attorneys of record for the defendants as follows:

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Patrick T. Ryan, Esq.
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CAYUGA ROCK SALT COMPANY
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Israel Packel, Esq.
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DAVID BERGER.
David Berger.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff

and

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Intervenor Plaintiffs

v.

CAYUGA ROCK SALT COMPANY,
INTERNATIONAL SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE, INCORPORATED.

OBJECTIONS OF DEFENDANTS CAYUGA ROCK SALT COMPANY, INTERNATIONAL SALT COMPANY, PIONEER SALT COMPANY, SALT SERVICE, INCORPORATED TO MOTION OF THE STATE OF NEW YORK FOR LEAVE TO INTERVENE AS PARTY PLAINTIFF.

Defendants Cayuga Rock Salt Company, International Salt Company, Pioneer Salt Company, Salt Service, Incorporated object to the Motion of the State of New York for Leave to Intervene, and urge the Court to deny the Motions. Defendants object for the following reasons:

1. On December 7, 1965, Judge Allan K. Grim entered an order closing the class on June 1, 1966. That order, attached hereto as Exhibit A, stated that "No additional parties plaintiff will be permitted to intervene in this action after June 1, 1966." The motion to intervene as party plaintiff was filed by the State of New York on June 14, 1966, almost two weeks after the closing of the class; accordingly, it must be denied.

2. The State of New York had ample notice of the pendency of this suit. This action was filed on July 1, 1963, two years and eleven months prior to the closing of the class. During those years, all absent members of the class had full notice and opportunity to petition to intervene in the action. The filing of the action by the City of Philadelphia was reported at length in the newspapers, and in legal periodicals and services, for example, the BNA Antitrust and Trade Regulation Report, No. 104, p. A-12. As a result of the widespread publicity given to these cases, the National Institute of Municipal Law Officers (hereinafter called "NIMLO") in the fall of 1964, sent a special communication to all of its members informing them of the existence of a possible cause of action on the part of any municipality purchasing rock salt. Shortly thereafter a meeting was held by the Institute in Washington, D. C. to discuss the advisability of suit and the possibilities in terms of available jurisdictions and types of actions. At that time, of course, the instant action was already pending here in the Eastern District of Pennsylvania. One of the purposes of the Washington meeting was to discuss the advantages of joining the Philadelphia class action or suing in other districts. A committee was formed by the Institute to consider these problems.

3. On January 13, 1965, the Defendant, International Salt Company, filed a Motion to close the class. Thereafter,

briefs were presented. This Motion was considered by the Court on numerous occasions between that date and December 7, 1965, when the order closing the class was, in fact, entered. During this entire period it was clear to all interested persons that the Defendants were making every effort to persuade the Court to close the class.

4. Further, ample notice was given of Judge Grim's intended action in closing the class. On June 9, 1965, Judge Grim wrote to counsel for plaintiffs suggesting that the class might be closed on July 1, 1965. This letter is attached as Exhibit B. On the next day, NIMLO's attorneys wrote a letter to all members of NIMLO advising them as follows:

> "Dear
>
> "On June 9, 1965, Judge Grim, who is presiding in the City of Philadelphia action, wrote to plaintiffs' counsel that he was considering closing the Philadelphia class action on July 1, 1965. The effect of this is unclear, but it would probably mean that other members of the class would not be allowed to intervene in the City of Philadelphia action. This, however, would not foreclose the City from filing a separate action if it were done within the time allowed by the applicable statute of limitations. Judge Grim's action would affect all NIMLO members. I thought you ought to be informed of this development and suggest that you give this matter your earliest attention.
>
> Sincerely, John J. Fleming, Chairman, NIMLO Committee on Antitrust Violations."

Accordingly, every member of the class had specific notice as long ago as June, 1965 that Judge Grim was contemplating closing the class.

5. On December 6, 1965 a hearing was held before Judge Grim on the defendants' formal motion to close the class. At that hearing, Judge Grim specifically asked general counsel for NIMLO who was present:

> "Tell me this: If I should sign the order that can be prepared closing discovery and closing the class as of June 1, 1966 [almost six months hence], how would you get that notice to the members of your Association?"

General counsel for NIMLO responded that a special release containing a copy of the order closing the class as of June 1, 1966 would be sent to all NIMLO members. Apparently when Judge Grim signed the order on December 7, 1965 this step was taken in accordance with counsel's statement to the Court, and hence the members of NIMLO, received still another notification (including a copy of Judge Grim's order itself) that if there was to be any intervention in the Philadelphia action it would have to be accomplished by June 1, 1966.

6. Courts in four other class actions in the rock salt litigation have closed those classes six months earlier, in December 1965, although each of those actions was instituted *after* this one. In Minneapolis, Judge Larson closed the following class actions as of December 31, 1965: an action [1] originally filed by the State of Minnesota on December 31, 1964 (eighteen month after the present suit was filed); an action [2] originally filed by the State of Wisconsin on January 4, 1965; and an action [3] originally filed by the

1. No. 4-64-Civ. 422.
2. No. 4-65-Civ. 1.
3. No. 4-65-Civ. 197.

State of Iowa on June 28, 1965 (virtually two years after this action was filed). On June 22, 1966, Judge Larson denied the petition of the city of Fort Wayne, Indiana to intervene because it was filed after the class was closed. In Massachusetts in an action[4] instituted on January 4, 1965 by the State of Massachusetts, Judge Caffrey closed the class as of December 15, 1965.

7. At a hearing held on November 29, 1965, Judge Grim referred to the closing of the Minneapolis class actions, noting that this question had been "in the back of my mind a long time." Judge Grim then stated that "all of these cases should as much as possible follow each other . . . ."[5] However, he decided on December 7, 1965 to delay closing the class until June 1, 1966, although this action had been instituted much earlier than the other actions. By comparison, therefore, the closing of the class in this action was long delayed, and this Court should not reverse its position at this late date.

8. All settlement negotiations in this case have been conducted on the assumption that the class would be closed June 1, 1966. No final settlement could be agreed upon until the class was closed. To reopen it now would be a serious setback to progress in this direction.

9. The State of New York has had almost three years to move to intervene in this action. Its failure to do so within extremely liberal time limits and after ample notice shows a lack of diligence or decision on its part. The State of New York has failed to act in time; it is now too late.

---

4. Civil Action No. 65-1-C.

5. Transcript, Hearing, November 29, 1965, at 46.

For the foregoing reasons, defendants respectfully request the Court to deny the Motion of the State of New York for Leave to Intervene as Party Plaintiff.

INTERNATIONAL SALT COMPANY,

By: LEWIS H. VAN DUSEN, JR.,

SALT SERVICE, INCORPORATED,

By: PAUL MATZKO,

CAYUGA ROCK SALT COMPANY,

By: DONALD BROWN,

PIONEER SALT COMPANY,

By: ROBERT W. SAYRE.

June 24, 1966

I certify that copies of these Objections have been served on all parties in the case by mailing same to their respective counsel.

LEWIS H. VAN DUSEN, JR.

Exhibit A to Objections.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.
CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA,
A MUNICIPAL CORPORATION, ON BEHALF OF ITSELF AND OTHERS SIMILARLY SITUATED,
Plaintiff

AND

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Intervenor Plaintiffs

v.

MORTON SALT COMPANY,
PIONEER SALT COMPANY,
SALT SERVICE, INCORPORATED,
INTERNATIONAL SALT COMPANY,
CAYUGA ROCK SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY.
CARGILL, INCORPORATED.

ORDER.

AND Now, this 7th day of December, 1965, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. The class as defined in plaintiff's and intervenor plaintiffs' Amended Complaint will be closed on June 1, 1966. No additional parties plaintiff will be permitted to intervene in this action after June 1, 1966.

2. June 1, 1966 will also mark the terminal date on or before which all parties must complete their discovery.

ALLAN K. GRIM, *J.*

Exhibit B to Objections.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA.

chambers of
ALLAN K. GRIM
Judge

June 9, 1965

David Berger, Esq.,
Cohen, Shapiro, Berger and Cohen, Esqs.,
2220 Philadelphia Saving Fund Building,
Philadelphia, Pa. 19107

Re: City of Philadelphia v. Morton Salt Co.,
et al., Civil Action No. 33781

Dear Mr. Berger:

July 1, 1965, will be the second anniversary of the time the suit was started. I am thinking of entering an order closing the class as of that time to prevent any additional interventions after that time. It seems to me that as a matter of convenience to the court and the parties a time must be fixed at which the class will be closed and to me July 1 seems to be a proper time.

However, I will be glad to hear comment by letter from any party on or before June 20th.

Very truly yours,

AKG:AH
c. All counsel

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, ET AL.

v.

MORTON SALT COMPANY, ET AL.

ORDER OF COURT DENYING MOTION TO INTERVENE FILED BY THE STATE OF NEW YORK, DATED 6/14/66; AND THAT THE CLASS FOR ALL PURPOSES IN THIS CASE IS CLOSED AS OF 6/1/66.

AND Now, to wit, this 1st day of February, 1967, the Motion to Intervene filed by the State of New York, dated June 14, 1966, is hereby denied and it is ordered and decreed that the class for all purposes in this case is closed as of June 1, 1966.

JOSEPH S. LORD, III, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 33781.

CITY OF PHILADELPHIA, ET AL.

v.

MORTON SALT CO., ET AL.

NOTICE OF APPEAL.

Notice is hereby given that the State of New York, intervening plaintiff, hereby appeals to the United States Court of Appeals for the Third Circuit from an Order entered on February 1, 1967, which denied its motion to intervene in the above captioned class action and which closed the class in the above captioned matter for all purposes as of June 1, 1966.

DAVID BERGER,
David Berger,
2220 PSFS Building,
Philadelphia, Pa. 19107.
Attorney for Appellant,
State of New York.

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FILED
MAR 6 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967.

No. 1087.

STATE OF NEW YORK,

Petitioner,

v.

MORTON SALT COMPANY, PIONEER SALT COMPANY, SALT SERVICE INCORPORATED, INTERNATIONAL SALT COMPANY, CAYUGA ROCK SALT COMPANY, DIAMOND CRYSTAL SALT COMPANY,

Respondents.

BRIEF FOR RESPONDENTS INTERNATIONAL SALT COMPANY, PIONEER SALT COMPANY, AND SALT SERVICE, INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Of Counsel:
DAVID P. BRUTON,
DRINKER BIDDLE & REATH.

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Counsel for Respondent, International Salt Company.

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Philadelphia, Pennsylvania. 19102
Counsel for Respondent, Salt Service, Incorporated.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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I.

COUNTER-STATEMENT OF THE QUESTION INVOLVED.

Should this Court grant certiorari to review the exercise of a district court's discretion in denying an untimely motion for intervention by the State of New York under F. R. C. P. 24 into a spurious class action under former F. R. C. P. 23(a)(3), where

(A) the attempted intervenor, knowing all the facts, deliberately elected not to seek intervention before the class was closed by court Order, issued almost six months prior to the closing date and pursuant to additional advance notice, of which the attempted intervenor was aware, given nearly one year before the closing date,

(B) the belated motion to intervene did not offer lack of notice, or any other reason or excuse whatsoever, to justify the attempted intervenor's deliberate decision not to seek intervention before the class was closed, and

(C) such untimely intervention would greatly prejudice the rights of the defendants who have settled with virtually all of the intervening class members in reliance upon the Order closing the class prior to the untimely attempted intervention?

II.

COUNTER-STATEMENT OF THE CASE.

Petitioner in this action is seeking review by Writ of Certiorari of the District Court's discretionary denial, affirmed *per curiam* by the Court of Appeals, of Petitioner's untimely motion for intervention into a treble damage "spurious" class action brought under former F. R. C. P. 23(a)(3) against manufacturers of rock salt. Petitioner's motion to intervene, bearing the name of the Attorney General of New York, was not filed until June 14, 1966 (182a).[1] This date was (a) two weeks after the class had been closed on June 1, 1966 pursuant to an Order of the District Court issued almost six months earlier on December 7, 1965 (170a); (b) two weeks after the timely filing of another Petition to Intervene bearing the name of the Attorney General of New York on behalf of the New York Thruway Authority (6b-9b); (c) more than one year after the District Court had first announced on June 9, 1965 its intention to close the class on July 1, 1965 (192a); (d) more than seventeen months after defendant International Salt Company had filed a motion to close the class, which motion was the subject of repeated discussion and argument before the District Court for more than a year thereafter until it was finally granted (34a-35a, 37a-50a, 17b-26b, 76a, 89a, 106a, 34b-42b); (e) more than three years after the class action itself had been commenced on June 1, 1963 (26a); and (f) more than six years after Petitioner had first learned of the alleged conspiracy charged in the class action, and had conducted its own independent investigation into the matter

1. Citations to portions of the record printed with the Petition for Certiorari are preceded with the designation "Pet. App."; citations to the appendices of Appellant and Appellees in the Court of Appeals —which appendices are part of the record before this Court—are designated by a number followed by "*a*" and "*b*", respectively.

(1b-5b, 12b, 14b, 16b, 205a-06a). Petitioner's motion to intervene was also not filed until a massive amount of discovery had already been completed by the original plaintiff and the eighty-one intervening plaintiffs who did intervene in a timely manner; and finally, intervention was not sought by Petitioner until intensive settlement discussions were underway between the parties—discussions which led to settlement by many defendants with most, if not virtually all, of the plaintiffs of record in the class action (25a, Docket Entries 603 and 604).

On August 10, 1966, Petitioner commenced an independent suit against some of the defendants in the original action. This suit is now pending in the Eastern District of Pennsylvania, *State of New York v. Cayuga Rock Salt Company, Morton Salt Company, International Salt Company, and Highway Materials Co., Inc.*, E. D. Pa., Civil Action No. 40919.

On February 1, 1967, Judge Joseph S. Lord, III, of the District Court (to whom the case was assigned after the death of Judge Allan K. Grim), denied Petitioner's motion to intervene (217a). Petitioner thereupon took an appeal to the Court of Appeals for the Third Circuit. In a unanimous *per curiam* opinion, the Court of Appeals (per Hastie, Freedman and Seitz, JJ.) on November 5, 1967 affirmed the District Court's decision (Pet. App., 1a-4a). The Court of Appeals noted that, despite the patent untimeliness of Petitioner's motion to intervene, the motion "set forth no reasons to excuse the tardy filing" (Pet. App., 3a). Holding that "a district court, in the exercise of discretion, may fix a reasonable terminal date for intervention" (Pet. App., 3a), the Court affirmed the lower court's denial of Petitioner's motion because no abuse of discretion had been shown (Pet. App., 4a). It is this Judgment and Opinion that Petitioner now asks this Court to review by Writ of Certiorari.

III.

REASONS FOR DENYING THE WRIT.

A. Petitioner Has Offered No Justification for Its Failure to Seek Intervention Before the Class Was Closed Pursuant to Advance Notice.

This case presents a single limited issue: did the District Court act within the limits of its discretion in declining to reopen a closed class to grant a belated and untimely motion for permissive intervention?[2] That this question does not raise any "special or important reasons" for discretionary review by this Court on Writ of Certiorari (Supreme Court Rule 19) is evident from the lengthy history of this well publicized litigation. This history conclusively establishes that Petitioner had ample opportunity to intervene before the class was closed, that Petitioner had adequate notice that the class would be closed on June 1,

---

2. Petitioner has vaguely suggested that it might be entitled to intervene in this case as a matter of right under F. R. C. P. 24. The Court of Appeals found it unnecessary to pass on this contention, which was not raised in the trial court, except to note that the provision of Rule 24 covering interventions as of right requires "timely application," a condition which Petitioner failed to meet in this case. But in any event, it is clear that Petitioner never had any absolute right to intervene. F. R. C. P. 24 permits intervention as of right only where the applicant claims an interest relating to "the property or transaction which is the subject of the action" and disposition of the action "may as a practical matter impair or impede his ability to protect that interest." There is no "property" or "transaction" in the original action here in which Petitioner has an interest, and the disposition of that action can in no way affect Petitioner's rights, which are in any event being pressed in a separate suit. The decision of this Court in *Cascade Natural Gas Corp. v. El Paso Natural Gas Corp.*, 386 U. S. 129 (1967), cited at p. 11 of the Petition has nothing to do with this case. In *El Paso*, no question was raised concerning the timeliness of intervention, and this Court held only that where a gas company had been ordered to divest itself of another gas company acquired through an illegal merger, a competitor who suffered competitive disadvantage from the merger had a direct interest in the terms of the divestiture and therefore was entitled to intervene as of right under new F. R. C. P. 24(a)(3).

1966, and that Petitioner has offered no excuse whatsoever for its failure to seek intervention prior to the cut-off date.

The Background of Government Rock Salt Litigation.

In May, 1959, the federal government first convened a grand jury to inquire into the rock salt industry. This grand jury was followed by two more panels, before which numerous witnesses were subpoenaed to appear at many sessions. The proceedings before these grand juries were accompanied by widespread publicity in the press (205a-06a, 15b-16b). Petitioner State of New York was thoroughly aware of these governmental investigations from their inception. Indeed, Petitioner's knowledge antedated the government's action because Petitioner had been receiving communications from the Port of New York Authority as early as 1957 concerning the prices of rock salt, identical bidding, or alleged or suspected violations of the antitrust laws having to do with rock salt or similar products (1b-5b, 12b, 14b). In the fall of 1960, the Attorney General of Petitioner, Louis J. Lefkowitz, went so far as to institute his own formal investigation into alleged rock salt price fixing (205a-06a, 16b).

On June 28, 1961, the third government grand jury finally handed down a criminal indictment in the District Court of Minnesota, charging defendants International Salt Company, Morton Salt Company and Diamond Crystal Salt Company, together with another defendant (Carey Salt Company) not a party to this action, with a conspiracy to fix the prices of rock salt in violation of the antitrust laws (32a). A five-week trial was held which ended on June 7, 1962 with a jury verdict of acquital for all defendants.

Thereafter the government pressed a companion civil suit, commenced in the Minnesota Court July 1, 1961, seeking injunctive relief based upon the evidence submitted in the record of the criminal case. This action was terminated

with respect to the Carey Salt Company by a consent decree entered on March 26, 1962, and with respect to International by a consent decree entered on November 4, 1963. The case proceeded to trial against the remaining defendants, Morton and Diamond, and was finally terminated with respect to them on October 25, 1965 by the decision of this Court affirming the decree entered by the trial court. *Morton Salt Company v. United States,* 382 U. S. 44 (1965).

The Instant Litigation.

On July 1, 1963, the City of Philadelphia commenced a treble damage action against Respondents under former F. R. C. P. 23(a)(3) on behalf of a class alleged to consist of "all other state and municipal governments, governmental agencies and governmental subdivisions similarly situated" (26a), alleging a conspiracy among respondents to fix the prices of rock salt in violation of the antitrust laws. This suit was the first of a series of treble damage actions brought in seven different states in the wake of the government criminal and civil antitrust proceedings referred to above.

Beginning in 1964, numerous members of the alleged class which the City of Philadelphia claimed to represent sought to intervene pursuant to F. R. C. P. 24(b), asserting that their claims presented questions of law or fact common to the class suit (3a-6a). Petitioner did not, however, choose to intervene at this time, despite the fact that Petitioner's Attorney General had not only conducted his own rock salt investigation in 1960, but also now had available to him the entire public transcript of the five-week criminal trial which the government has prosecuted in 1962.

On January 5, 1965, defendant International filed a motion in the alternative to close the alleged class (34a-35a). During the next year, this motion was the subject of repeated arguments, correspondence, and discussions before the lower court, all of which were widely publicized.

The question of when the alleged class should be closed was orally argued for the first time on April 21, 1965 (37a-50a, 17b-26b). On May 12, 1965, the District Court (the late Hon. Allan K. Grim) granted motions to intervene which by that time had been filed by 59 municipal or governmental agencies including (from the state of New York) New York City, New York City Transit Authority, Port of New York Authority, and the town of Oyster Bay, Long Island (53a). Again, Petitioner did not seek intervention at that time, although it then had available to it the initial fruits of discovery in the instant action, as well as the information obtained from its own prior investigation and the government litigation.

On June 9, 1965, the question of closing the class arose again when Judge Grim wrote to Petitioner's counsel, who then represented the City of Philadelphia and all but two of the intervening plaintiffs, noting that the second anniversary of the commencement of the class suit (July 1, 1965) was approaching, and stating that "I am thinking of entering an order closing the class as of that time to prevent any additional interventions after that time" (192a). On the following day, June 10, 1965, the National Institute of Municipal Legal Officers (NIMLO) sent out a notice to all of its thousands of members throughout the country calling attention to Judge Grim's letter, and stating that interventions would probably be barred after the class was closed, although separate actions could be maintained if the applicable statute of limitations had not run (208a-09a).

Petitioner's counsel then wrote to Judge Grim objecting to closing the class on July 1, 1965 (207a-08a), and the class remained open pending further argument on July 20, 1965. At that time, Judge Grim again expressed the view that "as of now, as a practical matter, maybe the class should be closed" (76a), and noted that

> "The Court has control of its own calendar to the point where if it says, 'It is getting to the point where I just can't control all these litigants and I am going to stop this and close this up,' I can't imagine that the discretionary power would not be admitted by an appellate court." (89a)

Petitioner's counsel specifically agreed with this observation, stating that "I think Your Honor would be right as far as the trial is concerned. I don't deny that . . ." (89a). Nevertheless, Judge Grim continued to allow the alleged class to remain open, and by December 6, 1965, an additional nine plaintiffs, including the City of Rochester, New York, had been permitted to intervene (6a, 9a, 10a, 12a, 13a). Once more, however, Petitioner was not among the intervenors.

On November 29, 1965, Judge Grim for the third time raised the question of closing the alleged class (34b-42b), and on December 6, 1965 yet another argument was held on this issue. Judge Grim then repeated that the only question in his mind was when the class should be closed, and said that in his judgment it should be closed well before trial (106a). He further indicated that he wanted notice of the closing to be circulated to potential class members throughout the country (107a), and in response to this request, counsel for NIMLO promised to send out such a notice immediately upon receipt of Judge's Grim's order (160a-63a).

Defendants urged that the alleged class be closed on December 31, 1965 (137a), pointing out that several similar state and municipal class actions involving rock salt which had been brought in other districts against the defendants *subsequent* to the filing of this suit were all being closed at the end of 1965 (136a, 189a). Judge Grim, however, decided to hold the class open until June 1, 1966, and entered an Order to that effect on December 7, 1965.

In the next six months, an additional thirteen parties (again not including Petitioner) intervened as plaintiffs (17a, 18a, 19a, 21a, 23a). One of these intervenors was the New York State Thruway Authority, which filed a motion to intervene on May 31, 1966, the final day before the class closed. The motion was filed over the name of Louis J. Lefkowitz, who appeared as one of the attorneys for the Authority (6b, 9b). When Petitioner, State of New York, at long last filed its belated motion to intervene on June 14, 1966, the name of Mr. Lefkowitz again appeared on the motion as Attorney General for the State of New York (182a).

On February 1, 1967, Judge Joseph S. Lord, III (who had then been assigned to this case after the death of Judge Grim) entered an Order denying the motion to intervene filed by Petitioner on June 14, 1966 and reaffirming Judge Grim's Order of December 7, 1965 that the class in this case would be, was, and is irrevocably closed as of June 1, 1966 (217a).

By the time Petitioner had belatedly attempted to intervene, two other significant developments had occurred in this litigation. First, intensive settlement negotiations were underway between the parties. These negotiations, which had begun in earnest in the early part of 1966 shortly after the District Court's Order of December 7, 1965 was entered, ultimately led to settlement by many defendants with most, if not virtually all, of the plaintiffs of record in this class action (25a). The Order of December 7, 1965 closing the class on June 1, 1966 was essential to these negotiations because it would otherwise have been impossible for the defendants to make any determination of the possible scope of their alleged liability. Indeed, International had consistently maintained throughout the litigation that any settlement was impossible without a final dismissal of the class suit as to it (54b-58b), and Judge

Grim had recognized the validity of this position on December 6, 1965 when he said: "I think if it isn't [closed], it might stand in the way of settlement" (106a). Judge Lord also agreed with this view, for he enabled International to settle on February 6, 1967 with all plaintiffs (except the City of Baltimore, which was permitted to maintain a separate suit) by terminating the class action as to International on that date (25a, Docket Entries 603 and 604).

The second crucial development which preceded Petitioner's untimely effort to intervene was the completion of a massive volume of discovery by all parties. A few statistics will indicate the dimensions of this discovery. Prior to June 1, 1966, plaintiff or the intervening plaintiffs had filed five different sets of interrogatories against some or all of the defendants, containing nearly 200 questions; defendants had filed six different sets of interrogatories against some or all of the plaintiffs, containing more than 200 questions; after objections had been argued and ruled upon by Judge Grim, defendants had answered many of these interrogatories with thirty separate sets of answers totalling nearly 2,400 pages; plaintiffs had filed answers aggregating more than 2,300 pages identifying the rock salt purchases for which damages were sought and disclosing the extent of their prior knowledge of the alleged conspiracy; forty-six days had been consumed in taking the depositions of fourteen witnesses, comprising 5,912 transcript pages, and involving the marking for identification of 415 separate exhibits; and defendants had also produced for examination, according to plaintiffs' counsel on February 1, 1966, "over a hundred thousand documents" (45b, 47b).

The foregoing detailed chronology establishes the central fact that Petitioner had both ample opportunity for timely intervention, and notice that the class would be

closed on June 1, 1966. Petitioner's claim that it "received no notice, express or constructive of the closing" (Petition, p. 12) is flatly contradicted by the record and the admissions of Petitioner's counsel made in open court.

In argument before the District Court on the motion to intervene, Petitioner's counsel first stated that:

> ". . . the problem in New York State may be one of what has often been termed the problem of governmental inaction and that some of the states and governmental units just wait to see how the litigation is developing . . ." (199a)

When the court pointed out that Petitioner certainly could have intervened within the period of six months' notice given by the Order of December 7, 1965, counsel replied:

> "I agree. I have no answer to the fact, and I would not try to be anything but candid with Your Honor; it would have been faster if New York had consulted with us earlier, even a week or two before, but nevertheless, we are confronted with the fact that the ultimate authority to proceed with the New York litigation did not arrive until after June 1st." (200a).

Moreover, counsel freely admitted that this "governmental inaction" by Petitioner was not the result of any lack of knowledge about the June 1, 1966 cut-off date, but was rather due to a *deliberate policy* decision. In summing up his argument to the trial court, counsel stated:

> "It seems to me that the real issue in the end comes down to this question. *If it was the policy for the sovereign State of New York prior to the 14th of June, 1966 not to intervene in this litigation and if, as a result of a reconsideration of all relevant factors and circumstances the Attorney General of New York concluded*

> *that the State of New York should intervene in this action, subject to the approval of this Honorable Court,* it seems to me that in view of the altered conditions that that *change of policy* should be given very serious consideration by Your Honor . . ." (214a) (Emphasis added.)

As the Court of Appeals recognized and stated, it is implicit in counsel's argument about a change of policy that Petitioner recognized the existence of the class action (Pet. App. 3a). Any conceivable doubt on this score is eliminated by the uncontested fact that, on *May 31, 1966* (the last day before the alleged class was closed), *the Attorney General of New York filed a motion to intervene on behalf of the New York Thruway Authority* (6b-9b). This establishes not only that Petitioner was fully advised of the existence of the class suit, and the need for intervention prior to June 1, 1966, but also that the Attorney General was fully capable of intervening before the cut-off date if he chose to do so. His failure to act in time can only be ascribed, as counsel for Petitioner admitted, to a deliberate decision not to intervene at that time.

Finally, and most damaging of all to Petitioner's position, is the glaring failure of the motion to intervene itself to offer any excuse whatsoever for Petitioner's failure to file before the deadline. Petitioner did not even attempt to meet its burden of justifying the untimeliness of its motion.

Respondents submit that, in the face of these facts and Petitioner's unjustified delay, there can be no question that the District Court acted within the limits of its discretion in declining to re-open the class for Petitioner's special benefit. Indeed, a contrary decision would have constituted an abuse of discretion. Petitioner's claim that defendants will suffer no prejudice if this untimely intervention is permitted ignores the fact that defendants have concluded

settlements with scores of plaintiffs in explicit reliance on the June 1, 1966 cut-off date as establishing the potential scope of their liability in this action.

Petitioner's argument also ignores the recognized power of a trial court to maintain control over the size and complexity of any litigation (particularly multi-party litigation which does not bind non-intervenors) to insure that it does not burgeon into unmanageable proportions. The Order of December 7, 1965 closing the class on June 1, 1966 was intended to, and did, achieve that wholly proper objective. The District Court's failure to depart from the terms of that Order can hardly be said to constitute an abuse of discretion appropriate for review by this Court by Writ of Certiorari, particularly where, as here, the complaining party deliberately elected not to comply with the Order.

B. The Discretionary Denial of Petitioner's Motion to Intervene Does Not Contravene the Standards for Intervention Set Forth by the Federal Rules of Civil Procedure Or by the Decisions of This Court or Any Other Court.

As set forth above, the class suit into which Petitioner seeks to intervene is a spurious class action under former F. R. C. P. 23(a)(3). The District Court so held in this case. *City of Philadelphia v. Morton Salt Company,* 248 F. Supp. 506, 513-14 (E. D. Pa. 1965). Under well settled case law, two consequences flow from this determination: first, that Petitioner will not be bound, as a non-intervening class member, by any judgment in this suit, and second, that Petitioner's attempted intervention is necessarily permissive under Rule 24(b). *E.g., Lipsett v. United States,* 359 F. 2d 956 (2d Cir. 1966); *Fox v. Glickman Corporation,* 355 F. 2d 161 (2d Cir. 1965), cert. denied sub. nom. *Levy v. Glickman Corporation,* 384 U. S. 960 (1966); 3 Moore, Federal Prac-

tice, ¶ 2314 (2d ed. 1967). But whether or not Petitioner's attempted intervention is treated as permissive or as of right, it is clear that in either case such intervention must be timely and that a trial court has discretion to deny a belated motion to intervene on the sole ground of untimeliness. *E.g., Tesseyman v. Fisher,* 231 F. 2d 583 (9th Cir. 1955); *Basle Theatres, Inc. v. Warner Bros. Pictures Distributing Corp.,* 24 F. R. D. 476 (W. D. Pa. 1959). See also, *Securities & Exchange Commission v. Bloomberg,* 299 F. 2d 315, 320 (1st Cir. 1962). As the Court of Appeals stated in the instant case, the power to fix a reasonable terminal date for intervention "is necessary to the orderly processing of litigation, to say nothing of calendar control" (Pet. App., 3a).

In the face of these well settled principles which are controlling in this case, Petitioner cites several wholly irrelevant cases in which it was held that a district court did not abuse its discretion in permitting intervention into spurious class actions at or after trial but before final judgments were entered.[3] None of these cases remotely sug-

3. In *Pentland v. Dravo Corporation,* 152 F. 2d 851 (3d Cir. 1945), cited at p. 9 of the Petition, the only issue was whether judgment on the pleadings should be granted in a spurious class suit six months after the complaint was filed, where no parties had sought intervention, and there was no evidence that any notice had been given to potential intervenors. In *Union Carbide and Carbon Corp. v. Nisley,* 300 F. 2d 561 (10th Cir. 1961), *appeal denied sub nom. Wade v. Union Carbide and Carbon Corp.,* 371 U. S. 801 (1963); *York v. Guaranty Trust Co. of New York,* 143 F. 2d 503 (2d Cir. 1944), *rev'd on other grounds* 326 U. S. 99 (1945); *State Wholesale Grocers v. Great Atlantic and Pacific Tea Company,* 24 F. R. D. 510 (N. D. Ill. 1959), and *Carroll v. American Federation of Musicians of the United States and Canada,* 33 F. R. D. 353 (S. D. N. Y. 1963); cited at pp. 8-9 of the Petition, the only question was whether the District Court might, in the exercise of its discretion, permit intervention prior to or even after trial. In *Hurd v. Illinois Bell Telephone Co.,* 234 F. 2d 942 (7th Cir. 1956), the Court of Appeals merely held that, on the unique facts of that case, it would exercise discretion in favor of permitting intervention on appeal. But not one of these cases held that a *denial* of intervention would have been an *abuse of*

gest that a District Court abuses its discretion in imposing a reasonable cut-off date for intervention before trial. Indeed, such a rigid rule would be utterly unreasonable, for it would deny to the trial court a fundamental tool for keeping complex litigation within manageable bounds, and would make it impossible for defendants in such litigation ever to make any determination, for purposes of settlement before trial, of the potential scope of their liability.

The record establishes in this case that the trial court thoroughly understood that no settlements would be possible without a final closing of the class in advance of trial. At the hearing on December 6, 1965, Judge Grim stated:

> "I would like to see the class closed long before or at least, I should say some time before the trial. I think if it isn't, it might stand in the way of settlement.
>
> "If the defendants know exactly what they have to meet, if the class is closed and they know exactly what they have to meet, that is one thing. If they don't that is another thing. One might say that you can't settle anything because you don't know what you are up against at the present time, and this is going through my mind as maybe the sensible way to do it" (106a).

The subsequent history of settlement negotiations in this litigation fully supports the trial court's reasoning.

It is wholly misleading to assert, as does Petitioner, that if intervention is denied, the original class suit will have been converted into a "trap" because, it is implied, Peti-

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discretion, nor did they involve the failure of an intervening party to seek intervention within a reasonable period determined in advance by the court. *Escott v. Barchris Construction Corp.,* 340 F. 2d 731 (2d Cir. 1965), *cert. denied sub nom. Drexel & Co. v. George Hall,* 382 U. S. 816 (1965), cited at pp. 8, 12 and 13 of the Petition, involved solely the question of whether the filing of a spurious class action tolls the statute of limitations with respect to all members of the alleged class.

tioner has innocently relied on the original action to preserve its rights. Aside from the fact that Petitioner is now pressing its rights in a separate suit, this boot-strap argument ignores the critical fact that Petitioner had ample opportunity to intervene prior to the cut-off date and deliberately chose not to do so. The issue here is not whether intervention could have been fairly denied to Petitioner *prior* to the cut-off date. If that was the question, some of the cases cited by Petitioner might have conceivable relevance. But in this case, Petitioner had no basis for relying, and did not in fact rely, on the original class action as preserving its claims beyond June 1, 1966, because Petitioner well knew that intervention would not be permitted after that date. Having failed to take any action prior to the deadline, Petitioner was not "trapped" by anything; it is merely complaining of the entirely foreseeable consequences of its own premeditated policy of inaction.

Finally, Petitioner can receive no comfort here from language in any decision of this Court concerning the importance of private antitrust litigation in enforcing the antitrust laws. The possible utility of private treble damage suits in supplementing such enforcement does not give Petitioner a license to ignore the trial court's reasonable order prescribing a limitation on further intervention. The Federal Rules of Civil Procedure apply to antitrust plaintiffs as well as to all other civil litigants; indeed, the need for effective control of the dimensions of a multi-party lawsuit is particularly compelling in the case of complex antitrust litigation. Petitioner's argument amounts to a plea for preferred treatment which finds no basis in either the Federal Rules or the decisions of this Court. The fact that Petitioner is a public body is irrelevant. As the Court of Appeals stated in its opinion:

"The procedures and provisions fairly established by our courts are binding on public as well as private litigants" (Pet. App. 4a).

IV.

CONCLUSION.

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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